No. 95-704

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

AKHTAR HAMID, SHRICHAND CHAWLA, SOHA, INC., IDRISS DEVCO, INC., S&L GENTRADE, INC., LEO D. CURRAN, NIAM MUSLEH, WILLY HERMANS, RED CIRCLE INVESTMENTS, LTD., SADIK MAHMOUD HASHIM, NUHA HUSSAIN MUBAREK, JALEH KHORASSANCHY, PHILIP MERZ and AMIT PANDYA, On Behalf Of Themselves and All Others Similarly Situated,

Petitioners,

vs.

PRICE WATERHOUSE; PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM, LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION; BANKAMERICA CORP.; BANK OF AMERICA NT&SA; HILL & KNOWLTON; GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; FIRST AMERICAN CORP.; FIRST AMERICAN BANKSHARES; PAUL ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN, CLARK CLIFFORD and CLIFFORD & WARNKE,

Respondents.

Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILBERG WEISS BERSHAD HYNES & LERACH
WILLIAM S. LERACH
Counsel of Record
DENNIS STEWART
ERIC A. ISAACSON
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD HYNES & LERACH
KEVIN P. RODDY
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

TABLE OF CONTENTS

Page

REPLY ARGUMENT 1

I. THE NINTH CIRCUIT PROPERLY EXERCISED APPELLATE JURISDICTION IN THIS CASE.. 1

II. PETITIONERS HAVE STANDING TO SUE THOSE DEFENDANTS WHO PARTICIPATED IN THE BCCI CRIMINAL ENTERPRISE..... 1

III. PERMITTING PETITIONERS TO LITIGATE THEIR RICO CLAIMS WOULD NOT INTERFERE WITH BCCI'S FOREIGN LIQUIDATION PROCEEDINGS AND WOULD NOT LEAD TO "DOUBLE COUNTING" OF DAMAGES 5

IV. BECAUSE THEY WERE FRAUDULENTLY INDUCED TO DEPOSIT THEIR MONEY INTO BCCI, A CRIMINAL ENTERPRISE RATHER THAN A LEGITIMATE BANK, PETITIONERS ARE ENTITLED TO PRIORITY OVER OTHER CREDITORS 8

V. THE DOCTRINE OF INTERNATIONAL COMITY DOES NOT SUPPORT DISMISSAL OF PETITIONERS' RICO CLAIMS 9

TABLE OF AUTHORITIES

Page

CASES

Amazing Enters. v. Jobin, 160 B.R. 850 (D. Colo. 1993) 6

Apostolou v. Fisher, Case No. 94 C 7244, 1995 U.S. Dist. LEXIS 13636 (N.D. Ill. Sept. 18, 1995) 3, 4

Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989) 4

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) 4

Biben v. Card, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,339 (W.D. Mo. 1988) 7

Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57 (2d Cir. 1985) 7

Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527 (1883) 9

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972) 4, 6, 7

Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) 2, 7

Ceribelli v. Elghanayan, 990 F.2d 62 (2d Cir. 1993) 2

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 900 (1995) 2

Cumberland Oil Corp. v. Thropp, 791 F.2d 1037 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986) 7

DeWit v. Firstar Corp., 879 F. Supp. 947 (N.D. Iowa 1995) 6

TABLE OF AUTHORITIES – Continued

Page

Drexel Burnham Lambert Group, Inc. v. Galadari, 777 F.2d 877 (2d Cir. 1985) 9

E.F. Hutton & Co. v. Hadley, 901 F.2d 979 (11th Cir. 1990) 6

GICC Capital Corp. v. Technology Fin. Group, 30 F.3d 289 (2d Cir. 1994) 2, 4

Hayes v. Gross, 982 F.2d 104 (3d Cir. 1992) 7, 8

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 2

In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992) 3

In re EDC, Inc., 930 F.2d 1275 (7th Cir. 1991) 4

In re Educators Group Health Trust, 25 F.3d 1281 (5th Cir. 1994) 6

In re Equity Funding Corp. Sec. Litig., 603 F.2d 1353 (9th Cir. 1979) 7

In re LendVest Mortg., Inc., [1990-1991 Transfer Binder] Bankr. L. Rep. (CCH) ¶73,595 (N.D. Cal. 1990) 7

In re Ozark Restaurant Equip. Co., 816 F.2d 1222 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987) 6, 7

In re Rare Coin Galleries, Inc., 862 F.2d 896 (1st Cir. 1988) 6, 7

In re Sunrise Sec. Litig., 916 F.2d 874 (3d Cir. 1990) 5

Koch Refining v. Farmers Union Cent. Exch., 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988) 6

TABLE OF AUTHORITIES – Continued

Page

Melamed v. Lake County Nat'l Bank, 727 F.2d 1399 (6th Cir. 1984) 7

Mid Atlantic Telecom v. Long Distance Servs., 18 F.3d 260 (4th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 323 (1994) 2

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333 (7th Cir. 1989) 2

National Organization for Women, Inc. v. Scheidler, ___ U.S. ___, 114 S. Ct. 798 (1994) 2, 3

Pate v. Hunt, 149 B.R. 96 (Bankr. N.D. Tex. 1992) 7

Philadelphia Gear Co. v. Philadelphia Gear, S.A., 44 F.3d 187 (3d Cir. 1994).....9, 10

Riley v. Simmons, 45 F.3d 764 (3d Cir. 1995)..... 8

Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523 (9th Cir. 1976) 7

Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991) 3, 4

St. Louis & S.F. Ry. Co. v. Johnston, 133 U.S. 566 (1890) 9

Steinberg v. Buczynski, 40 F.3d 890 (7th Cir. 1994) 6

University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991).....2, 8

Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988) 4, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

Federal Rule of Appellate Procedure 4(a) 1

Federal Rule of Civil Procedure 12(b)(6) 5

SECONDARY AUTHORITY

V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* (4th ed. 1989) §529 9

REPLY ARGUMENT

I. THE NINTH CIRCUIT PROPERLY EXERCISED APPELLATE JURISDICTION IN THIS CASE

Contrary to Respondents' argument, *see* Resp. Br. at 2-4,[1] the court below properly exercised appellate jurisdiction over this case. Respondents' arguments were fully analyzed by the Ninth Circuit which concluded, based upon Fed. R. App. P. 4(a) and its own precedent, that the appeal was timely filed. A-5 to A-7. Thus, there is no "serious threshold issue" as to appellate jurisdiction, Resp. Br. at 2, and this Court should avoid Respondents' invitation to ignore the serious legal issues raised by the Petition.

II. PETITIONERS HAVE STANDING TO SUE THOSE DEFENDANTS WHO PARTICIPATED IN THE BCCI CRIMINAL ENTERPRISE

Respondents' and Fiduciaries' oppositions to the Petition embody a critical inconsistency demonstrating why review should be granted by this Court. While Fiduciaries argue that BCCI "was the victim of the wrongdoers' conduct," Fid. Br. at 7, and that Petitioners' claims "belong to" BCCI, *id.* at 8, Respondents acknowledge "the many sins committed by BCCI around the globe" and concede that "BCCI was a bad bank," Resp. Br. at 4, thereby conceding that BCCI was a *perpetrator* of RICO predicate acts, *not* a victim of *others'*

---

[1] References to the Petition for Writ of Certiorari are stated herein as "Pet. at ___"; references to its appendices are stated as "A-___." References to Respondents' Brief in Opposition are stated as "Resp. Br. at ___," while references to the Brief of First American Corp. *et al.* in Opposition are stated as "First Amer. Br. at ___." References to the Brief of the Court Appointed Fiduciaries ("Fiduciaries") of BCCI, as Amicus Curiae, in Support of Respondents, are stated as "Fid. Br. at ___"; references to its appendices are stated as "Fid. Br. Appx. at ___a."

criminal acts. Pet. at 22-23 & n.19; A-65 to A-67, A-113 to A-115.[2]

Notwithstanding Respondents' gross mischaracterization of the Complaint's allegations, Resp. Br. at 7-9, Petitioners allege that defendants participated in a fraudulent scheme to mislead bank regulators *and* defraud depositors of their money. In describing defendants' complex scheme, the district court stated, *inter alia*, that "[Petitioners] were defrauded into placing their deposits into a criminal enterprise instead of a legitimate bank because BCCI falsely represented that it had substantial assets, profitability, a lawful operation and would be able to honor depositors' claims." A-30. Petitioners' allegations clearly satisfy the proximate causation standard announced in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).[3]

---

[2] Fiduciaries' characterization of BCCI as the "victim of wrongdoers' conduct," Fid. Br. at 7, ignores this Court's statement in *National Organization for Women, Inc. v. Scheidler*, ___ U.S. ___, 114 S. Ct. 798, 804 (1994) ("*NOW*"), that "the 'enterprise' in subsection (c) [of § 1962 of RICO] connotes generally the *vehicle* through which the unlawful pattern of racketeering activity is committed, rather than the *victim* of that activity." (Emphasis added.) In asserting that BCCI was a "victim" of the fraudulent scheme, the court below (and the Fiduciaries) miss the critical distinction between fraud *on* the Bank (wherein BCCI is a victim) and fraud *by* the Bank (wherein BCCI is one of the perpetrators). *See* A-20; Fid. Br. at 6-8; *compare Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 456 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) *with Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). The Fiduciaries' characterization is also contradicted by BCCI's 1991 guilty plea to criminal RICO and state law charges, *see* Fid. Br. Appx. 6a-8a (Plea Agreement), and its forfeiture of hundreds of millions of dollars in U.S. assets, *see id.* at 31a-32a (Order of Forfeiture).

[3] *See, e.g., GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 292-93 (2d Cir. 1994); *Mid Atlantic Telecom v. Long Distance Servs.*, 18 F.3d 260, 262-64 (4th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 323 (1994); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 900 (1995); *Ceribelli v. Elghanayan*, 990 F.2d 62, 65 & n.3 (2d Cir. 1993); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 274 (3d Cir. 1991).

Contrary to Respondents' assertion, Resp. Br. at 5-6, Petitioners' injuries[4] are not "derivative." The primary characteristic of this case is the involvement of a bankrupt corporation (BCCI) in pari delicto with other players (defendants) orchestrating fraudulent or otherwise illegal schemes. The players include a bankrupt corporation, creditors who have invested in that corporation, and non-debtor third parties who have committed the fraud that has caused injury. This case also involves a Ponzi scheme where investments (here deposits) were solicited. The difference between this case and the ones relied upon by Respondents, Resp. Br. at 6, 9-12, is that the debtor corporation, although in bankruptcy, has not sustained injury as a *victim* of the fraud but is injured, if at all, only because it participated in pari delicto in the fraudulent scheme as a corporate co-conspirator and was the subject of regulatory seizure when the scheme went sour. *See, e.g., In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992). "The rule in these cases is that 'when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors,' " *Apostolou v. Fisher*, Case No. 94 C 7244, 1995 U.S. Dist. LEXIS 13636, at *30 (N.D. Ill. Sept. 18, 1995) (quoting *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991)), and, therefore, plaintiffs' injury is *direct*.

Accepting as true the allegations of Petitioners' Complaint, BCCI was not a victim of fraud. Defendants did not target their fraudulent actions against BCCI; they used it as an

---

[4] Respondents assert that Petitioners did not suffer *any* injury to their business or property, Resp. Br. at 4 & n.5, ignoring the express (and detailed) allegations of Petitioners' Complaint, Pet. at 4 & n.3; A-115 to A-132; these allegations of injury are clearly sufficient under *NOW*, 114 S. Ct. at 803; *see also* Pet. at 20-22, particularly when coupled with allegations that the district court characterized as "clearly and painstakingly detail[ing] defendants' involvement with BCCI." A-33; *compare* Pet. at 13 *with* Resp. Br. at 16 n.17. Respondents ignore the acknowledgement in BCCI's 1991 Plea Agreement that "the failure of BCCI is likely to cause thousands of innocent depositors and other creditors throughout the world to suffer losses in the aggregate in billions of dollars." Fid. Br. Appx. 3a.

instrument to defraud Petitioners, who were the principal targets of the Ponzi scheme. BCCI did not conduct any legitimate business; its sole purpose was to act as a conduit for depositors' funds. Although BCCI is now bankrupt, and therefore injured, because its accounts were used to finance illegal transactions, siphoned off to BCCI insiders and affiliates and lost forever when the Bank was seized by regulators, Petitioners' multi-million dollar injuries do not flow from BCCI's injury. BCCI, in fact, is only injured because its depositors were defrauded. Otherwise, it would not have had any money to be looted. Although BCCI was arguably injured by the scheme, BCCI was not the only target of defendants' Ponzi scheme. The injury that Petitioners suffered, therefore, was not merely derivative of any injury sustained by BCCI; the injuries suffered by Petitioners were *direct* because they were targets of a fraudulent scheme that included BCCI as a means to effectuate the conspiracy's goals.[5]

In the alternative, Petitioners suffered both derivative injuries – as creditors of BCCI – and direct injuries – as targets of the Ponzi scheme of which BCCI was a part. Under a second line of cases which the court below ignored, the creditor of a bankrupt corporation seeks to assert a claim against a third party based on actions the third party took directly against the individual creditor, even though this same third party also injured the corporation, sending it into bankruptcy. Although the creditor's injuries are both direct *and* derivative, courts hold that an individual creditor may pursue a cause of action against a third party outside bankruptcy for the direct injuries that the creditor, rather than the corporation, suffered.[6]

---

[5] *See, e.g., Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429-34 (1972); *GICC Capital*, 30 F.3d at 293; *Shearson*, 944 F.2d at 118; *In re EDC, Inc.*, 930 F.2d 1275, 1279 (7th Cir. 1991); *Williams v. California 1st Bank*, 859 F.2d 664, 666 (9th Cir. 1988); *Apostolou*, 1995 U.S. Dist. LEXIS 13636, at *41-*42; *see also* Pet. at 24-26 & nn.23-24.

[6] *See, e.g., Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Apostolou*, 1995 U.S. Dist. LEXIS 13636, at *42.

III. PERMITTING PETITIONERS TO LITIGATE THEIR RICO CLAIMS WOULD NOT INTERFERE WITH BCCI'S FOREIGN LIQUIDATION PROCEEDINGS AND WOULD NOT LEAD TO "DOUBLE COUNTING" OF DAMAGES

Contrary to Respondents and Fiduciaries, Resp. Br. at 12-13; Fid. Br. at 6-10, allowing Petitioners to litigate their RICO claims against the wrongdoers who defrauded depositors – BCCI's officers, directors and controlling shareholders, as well as the Bank's lawyers and accountants who participated in the criminal enterprise – would *not* lead to "double counting" of damages and would *not* "interfere" with the foreign liquidation proceedings.[7] The interference argument, which is based on the discredited notion that BCCI was the "victim" of the fraudulent scheme – not one of the wrongdoers – and that Petitioners' RICO claims belong to BCCI's Fiduciaries, Resp. Br. at 9-11; Fid. Br. at 7-8, 12, ignores *Caplin*, where a bankruptcy trustee filed a breach of duty action on behalf of debenture holders against an indenture trustee (Marine) who allegedly permitted the corporation to violate the indenture. This Court held that the trustee had no

---

[7] The court below noted that "BCCI is being liquidated in international proceedings in Luxembourg," A-20; however, it made no *factual* findings about the nature of those proceedings or the law under which they are being conducted, nor did it address the liquidator's power or authority. *Id.* Fiduciaries did not appear in the courts below to contest Petitioners' standing, thus, there is no factual record to support their current assertions about the purported status of those liquidation (and other) proceedings. Fid. Br. at 3-9. This critical omission distinguishes *In re Sunrise Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990), where the FDIC, acting as statutory receiver for the insolvent thrift institution, intervened in the district court, objecting to the plaintiff depositors' standing to assert RICO claims seeking to recover lost interest based upon the defendant insiders' failure to disclose improper business practices. The Third Circuit, citing "important policy concerns," including distribution "in accordance with the *federal* priority scheme," agreed that maintenance of the depositors' action threatened to disrupt liquidation of the thrift's assets and granted the FDIC's summary judgment motion. *Id.* at 888 (emphasis added). In this case, there is no factual record supporting the conclusion – on a Rule 12(b)(6) motion – that allowing Petitioners' claims to proceed would "interfere" with BCCI's liquidation. A-20; *see also* Pet. at 27-28 & nn.26-27.

standing to raise claims of misconduct by that third party on behalf of creditors of the estate (*i.e.*, victims of the alleged breaches of duty). *Caplin*, 406 U.S. at 434. *Caplin* emphasizes that the victims (like Petitioners here) should be permitted to sue, make their own decisions and have control of litigation brought on their behalf. *Id.* at 431. This Court recognized that a trustee who attempts to represent victims of the wrongdoing might take actions or assert legal claims which are inconsistent with lawsuits that the victims might bring themselves, stating that "it is extremely doubtful that the trustee and all debenture holders would agree on the amount of damages to seek, or even on the theory on which to sue," *id.* at 432 (footnote omitted), that "[t]he trustee may well have interests that differ from those of the bondholders" and that "[t]he conflict may at times be unfavorable to the debenture holders"; in such a case, "the debenture holders might regret placing their confidence in the trustee." *Id.* at 432 n.21.[8]

The truth of *Caplin*'s pronouncements may be seen in this case because Fiduciaries have failed to sue many of the wrongdoers named in Petitioners' Complaint and, even in the purportedly pending cases brought by Fiduciaries, they have asserted RICO claims against a minuscule number of defendants who are, in all likelihood, judgment-proof. Fid. Br. at 8-9.[9] Thus, *Caplin* controls here and Fiduciaries have failed

---

[8] In addition to ignoring *Caplin*, Fiduciaries and Respondents ignore numerous cases holding that they do not have standing to sue on behalf of Petitioners, the victims of BCCI's fraudulent scheme, and that they cannot preempt Petitioners' claims. *See, e.g., Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994); *In re Educators Group Health Trust*, 25 F.3d 1281, 1284-85 (5th Cir. 1994); *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 985-87 (11th Cir. 1990); *In re Rare Coin Galleries, Inc.*, 862 F.2d 896, 900 (1st Cir. 1988); *DeWit v. Firstar Corp.*, 879 F. Supp. 947, 996 (N.D. Iowa 1995); *Amazing Enters. v. Jobin*, 160 B.R. 850, 851 (D. Colo. 1993). *Caplin* remains the law under the revised bankruptcy code. *Koch Refining v. Farmers Union Cent. Exch.*, 831 F.2d 1339, 1347-48 n.11 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988); *In re Ozark Restaurant Equip. Co.*, 816 F.2d 1222, 1228 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

[9] Fiduciaries' truncated descriptions of the actions it has purportedly brought against the wrongdoers, Fid. Br. at 8-9, do not mention whether any of those defendants have asserted that the Fiduciaries, who stand in BCCI's shoes, lack

to advance any persuasive reasons why Petitioners' RICO claims belong to them.[10]

The "double counting" argument, Fid. Br. at 6, was expressly rejected in *Hayes v. Gross*, 982 F.2d 104 (3d Cir. 1992), which held that stock purchasers in a savings association (Bell) who alleged that its officers and directors had misrepresented its financial condition, thereby causing the purchasers to pay an inflated price for its stock, could assert their claims directly against the corporate insiders:

> Allowing plaintiff to pursue this claim will neither prejudice the corporation and its other stockholders nor permit a double recovery for the same injury. If Bell has claims against its officers and directors arising from their mismanagement, the [Resolution Trust Corporation] is free to pursue those claims for the ultimate benefit of the creditors and stockholders of Bell. Assuming solvency on the part of the defendants, as we must on this record, we see no conflict between plaintiff's interest and those of the creditors and other stockholders.

---

standing to sue them because BCCI participated in the fraudulent scheme. *See, e.g., Rare Coin Galleries*, 862 F.2d at 901 ("The trustee steps into the shoes of the debtor for the purposes of asserting or maintaining the debtor's causes of actions."); *Pate v. Hunt*, 149 B.R. 96, 101 (Bankr. N.D. Tex. 1992) ("A co-conspirator in a fraudulent act, such as the RICO bankruptcy fraud alleged here, 'cannot also be a victim entitled to recover damages, for he cannot have relied on the truth of the fraudulent representations and such reliance is an essential element in a cause of fraud.' ") (quoting *Cenco*, 686 F.2d at 454).

[10] Decisions following *Caplin* reject the notion that Fiduciaries have standing to assert *any* claims on behalf of Petitioners. *See, e.g., Williams*, 859 F.2d at 667; *Ozark Restaurant Equip.*, 816 F.2d at 1228); *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986); *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 n.4 (2d Cir. 1985); *Melamed v. Lake County Nat'l Bank*, 727 F.2d 1399, 1404 (6th Cir. 1984); *In re Equity Funding Corp. Sec. Litig.*, 603 F.2d 1353, 1360-61 (9th Cir. 1979); *Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523, 527 (9th Cir. 1976); *In re LendVest Mortg., Inc.*, [1990-1991 Transfer Binder] Bankr. L. Rep. (CCH) ¶73,595, at 97,814 (N.D. Cal. 1990); *Biben v. Card*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,339, at 94,214 (W.D. Mo. 1988).

Id. at 108-09. "As far as the potential for double recovery is concerned," the court concluded, "[i]t will suffice for present purposes to conclude, as we do, that double recovery is not inherent in plaintiff's theory of the case and, accordingly, that recovery without duplication is possible." *Id.* at 109 (footnote omitted).[11]

IV. BECAUSE THEY WERE FRAUDULENTLY INDUCED TO DEPOSIT THEIR MONEY INTO BCCI, A CRIMINAL ENTERPRISE RATHER THAN A LEGITIMATE BANK, PETITIONERS ARE ENTITLED TO PRIORITY OVER OTHER CREDITORS

Echoing the court below, Fiduciaries and Respondents contend that permitting Petitioners to pursue RICO claims against those who defrauded them would enable depositors to "jump ahead" of other creditors in priority. Fid. Br. at 6; Resp. Br. at 13 n.15. Yet that is precisely what the law allows where innocent depositors are fraudulently induced to deposit their money into a criminal enterprise, rather than a legitimate

---

[11] In *Hayes*, 982 F.2d at 107-09, the Third Circuit distinguished *Sunrise*, upon which the court below, Respondents and the Fiduciaries rely. *See also University of Maryland*, 923 F.2d at 274 (distinguishing *Sunrise* and holding that policyholders of an insolvent insurer could sue Peat Marwick for wrongly certifying the insurer's financial statements, even though the Pennsylvania Insurance Commissioner, in her capacity as the insurer's statutory receiver, intervened and argued that permitting the policyholders to sue would frustrate the state's regulatory scheme to rehabilitate insolvent entities). The Third Circuit followed *Hayes* in *Riley v. Simmons*, 45 F.3d 764 (3d Cir. 1995), where it held that annuitants had standing to bring a securities fraud action against the former directors of an insolvent life and health insurer alleging misrepresentations that induced them to purchase annuities issued by the insurer. The Third Circuit reversed the rulings of the district court, which permitted the New Jersey Commissioner of Insurance to intervene and held that continuation of the annuitants' action would conflict with the insurer's ongoing state rehabilitation proceedings. *Id.* at 766. Judge Hutchinson stated that the annuitants' claim "is for losses they directly suffered, not as stockholders derivatively injured by the directors' or officers' failure to meet their fiduciary duties to the corporation," *id.* at 774, thus, the annuitants' claims "are distinct from those the Commissioner now presses in the pending state action." *Id.* at 774-75 (footnote omitted).

bank. *St. Louis & S.F. Ry. Co. v. Johnston*, 133 U.S. 566 (1890); V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §529, at 690-91 (4th ed. 1989) ("[A] bank that receives deposits when it knows that it is hopelessly insolvent becomes a constructive trustee of the money deposited, *and the depositor is entitled to priority over the general creditors of the bank*, provided it can identify the money deposited or trace it into the assets of the bank.") (emphasis added; footnote and citations omitted).

V. THE DOCTRINE OF INTERNATIONAL COMITY DOES NOT SUPPORT DISMISSAL OF PETITIONERS' RICO CLAIMS

Fiduciaries now contend – for the first time by *any* party to this proceeding – that "considerations of comity" support dismissal. Fid. Br. at 10. No court has accorded comity to international liquidation proceedings in the absence of a motion by a party to extend comity. *See, e.g., Philadelphia Gear Co. v. Philadelphia Gear, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994). There has been no showing, on any *factual* record, that (1) the foreign liquidation proceeding shares the U.S. policy of equal distribution of assets; and (2) the foreign state's law mandates the issuance or at least authorizes the request for the stay. *Id.* Because this issue was *never* raised by *any* party in the courts below, there was no "evidentiary hearing with expert testimony to ascertain foreign laws and procedures," which is mandatory where (as here) these matters are "in dispute." *Id.* at 193 (Mexican bankruptcy proceeding).[12]

---

[12] *See also Drexel Burnham Lambert Group, Inc. v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985) (plaintiff creditor was entitled to discovery and an evidentiary hearing on the issue of whether international comity barred its action; "Drexel never was afforded even the barest opportunity to determine the fairness of the proposed Dubai proceeding. . . . Here, the district court is sending Drexel into uncharted territory. In fairness to Drexel, therefore, it should have been afforded reasonable discovery and an evidentiary hearing."). This Court's decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883), is clearly distinguishable because it gave deference to bankruptcy proceedings in Canada, a sister common law jurisdiction with bankruptcy procedures akin to our own. *See Drexel*, 777 F.2d at 881.

Because no motion to extend comity was ever filed, the requisite discovery, evidentiary hearing and district court findings were never conducted or made. *Philadelphia Gear*, 44 F.3d at 194. As a result, there is no reasoned basis upon which to extend comity to BCCI's foreign liquidation proceedings and Fiduciaries cannot justify denial of the Petition relying on this last ditch argument.

DATED: December 8, 1995

MILBERG WEISS BERSHAD
HYNES & LERACH
WILLIAM S. LERACH
Counsel of Record
DENNIS STEWART
ERIC A. ISAACSON
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Attorneys for Petitioners